

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AVOCENT REDMOND CORP., a Washington  
corporation,

Plaintiff,

v.

ROSE ELECTRONICS, a Texas general  
partnership; PETER MACOUREK, an  
individual; DARIOUSH "DAVID" RAHVAR,  
an individual; ATEN TECHNOLOGY INC., a  
California corporation; ATEN  
INTERNATIONAL CO., LTD., a Taiwanese  
Company; BELKIN INTERNATIONAL, INC.,  
a Delaware corporation, and BELKIN INC., a  
Delaware corporation,

Defendants.

NO. C06-1711-MJP

AVOCENT'S REPLY IN SUPPORT OF  
MOTION TO LIFT THE STAY AND  
REQUEST FOR A SCHEDULING  
CONFERENCE

Defendants plainly want more delay and they are not afraid of seizing on any excuse to ask for it. Defendants' combined Opposition ("Opp.") makes clear that new grounds upon which to request delay can always be found. More than 42 months into the stay, it is not clear what event, or combination of events, will warrant resumption of this case. Nor is it clear when those events will occur. But it is not proper to indefinitely delay an action to see what happens in other litigation. Indeed, that approach runs counter to the express instruction of Fed. R. Civ. P. 1 that all other rules are to be administered to "secure the just, speedy, and inexpensive determination or every action and proceeding." Awaiting the conclusion of other litigation, especially when that litigation was initiated years *after* the proceeding at issue, seriously impairs a party's access to court.

**A. Litigation Should Not Be Stayed Pending Other Litigation**

Defendants urge this Court to maintain the stay while any other "related" case, including those filed against unrelated parties years after this case was filed, is still pending. Defendants suggest that the conservation of resources and the avoidance of duplicative litigation, with the attendant risk of inconsistent judgments, justify the additional delay. But the Federal Circuit and the Supreme Court agree that litigation should not be stayed pending conclusion of other, even related, litigation. *Landis v. North Am. Co.*, 299 U.S. 248 (1936) (reversing stay granted on the basis of other litigation); *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (finding that avoidance of duplicative litigation and conservation of judicial resources are an inadequate basis to suspend proceedings pending conclusion of other litigation). The logic is simple, litigation calendars are not predictable.

This case demonstrates the point. When this Court denied Avocent's earlier motion to lift the stay on October 27, 2009, the Court of Federal Claims case was scheduled for trial less than seven months later, starting on May 11, 2010. Trial obviously did not start as scheduled. A year later, not only has no trial date been set, there may never be a trial. And if that case were tried, the defendants in this action would no doubt ask this Court to continue the stay pending appeal in that action irrespective of who won at trial. The grounds for that request would be the

1 same as the defendants' basis for maintaining the stay now, avoidance of duplicative litigation  
 2 and the risk of inconsistent judgments. Courts routinely deny requests to stay litigation pending  
 3 resolution of other litigations. *Privasys, Inc. v. Visa Int'l*, 2007 U.S. Dist. LEXIS 86838 (N.D.  
 4 Cal. 2007) (denying defendant's motion to stay patent infringement claims against it pending  
 5 conclusion of infringement claims against other defendants); *Lifelink Pharma., Inc. v. NDA*  
 6 *Consulting, Inc.*, 2007 U.S. Dist. LEXIS 62674 (N.D. Ohio 2007) (same); *Transmation, Inc. v.*  
 7 *Gay Engineering & Sales Co.*, 336 F. Supp. 959 (S.D. Tex. 1971) (same).

8 Nor could the defendants find case authority for the stay they request. Defendants cite  
 9 *Pfizer Inc. v. Apotex Inc.*, 640 F. Supp. 2d 1006, 1007 (N.D. Ill. 2007). In *Pfizer*, however, the  
 10 patent owner had filed an infringement action in a first state, and the defendant in that action  
 11 challenged jurisdiction in that proceeding and filed a declaratory judgment action in a second  
 12 state. Courts entertaining the second-filed declaratory judgment action routinely stay the second  
 13 filed action in order to provide the court handling the first-filed action the short period necessary  
 14 to resolve the defendant's jurisdictional challenge, and that is exactly what the *Pfizer* court did.  
 15 That situation, however, is different than the present case. First, this is the first-filed action  
 16 (2006 vs. 2008). Second, in *Pfizer*, either the first-filed or the second-filed action would go  
 17 forward, not both. Here, an Avocent win in the Court of Claims action will not vitiate the need  
 18 for a trial in this Court. The Aten and Belkin defendants are not parties to the Court of Claims  
 19 action and Rose has vowed to re-litigate any infringement finding made by the Court of Claims.<sup>1</sup>

20 Defendants mischaracterize the *Avocent v. Raritan* action as "duplicative" of this case  
 21 knowing full well that the parties are different; the accused products are different; the  
 22 infringement issues are different; Raritan has asserted unenforceability defenses not asserted by  
 23 the defendants here; the prior art relied upon by the defendants and Raritan is different; and the  
 24 damages at issue in *Raritan* are different than those claimed here. The Raritan case is not  
 25 "duplicative."

26  
 27 <sup>1</sup> Conversely, a judgment against Rose in this action, where the vast majority of Rose's sales will be accounted for, would preclude litigation of those same issues in the Court of Claims action.

1           **B. The Court of Federal Claims Is Nowhere Near the Eve of Trial**

2           Contrary to defendants' suggestion, the Court of Federal Claims action is not on the "eve  
3 of trial" and the parties are not awaiting a decision by Judge Margolis on the last remaining  
4 summary judgment motion. Avocent, Rose and the United States twice met with Judge Margolis  
5 to mediate the Court of Claims action, and twice the parties walked out of the mediation with an  
6 agreement. In both cases, Rose sought additional terms. The parties, with Judge Margolis' help,  
7 were able to reach agreement on Rose's first round of additional terms, and the parties are in the  
8 process of negotiating on Rose's second round of additional terms. In the meantime, however,  
9 Judge Margolis has been operating under the assumption that the Court of Claims litigation will  
10 not go to trial. He is not working on the last of the summary judgment motions or making any  
11 other trial preparations. Judge Margolis advised both Rose and Avocent of this fact six months  
12 ago (when the parties first reached agreement) and then again in February (when the parties  
13 reached agreement on Rose's first set of additional demands).

14           Although defendants here assert that trial in the Court of Claims action has in fact been  
15 scheduled, no date has been set. Rather, the current Scheduling Order provides a sliding  
16 schedule in that trial will commence 49 days after Judge Margolis decides the last remaining  
17 dispositive motion. But Judge Margolis is not working on that motion – he thinks the case has  
18 settled. Thus, no one is in a position to even guess when, or even if, the Court of Claims case  
19 will go to trial. Whatever else may be said about the case, it is plainly not on the eve of trial.

20           Rose, of course, is in the best position to determine its true settlement intentions, but  
21 Rose has not advised Judge Margolis that it is not settling. In their Opposition, defendants crop  
22 language from Avocent's transmittal of its most recent draft of the agreement so as to wrongly  
23 suggest that Avocent and Rose would not settle. Avocent stated that it did not think that the  
24 parties would agree "on the prior versions of the Settlement Agreement that we have  
25 exchanged." (Dkt. No. 236-3). That is the language cropped out of defendants' quotation of that  
26 email. That is quite different than saying that the parties are not going to reach any agreement as  
27 defendants suggest, in bold, in their Opposition. (Opp. at 4). The previous versions of the

1 settlement agreement did not include the additional terms Rose sought, and thus, those versions  
 2 were taken off the table to avoid confusion as to the current state of the proposed agreement.  
 3 Avocent's latest proposal built on the parties' prior agreements and added the additional terms  
 4 requested by Rose. That draft simply superseded the earlier drafts.

5 In any event, the continuing uncertainty as to the fate of the Court of Claims litigation  
 6 underscores the policy of not staying litigation to await conclusion in even related litigation.  
 7 Predicating a stay on the conclusion of another litigation renders the stay indefinite by leaving  
 8 the schedule open. The effect is a denial of court access. *See Landis*, 299 U.S. at 256 (finding  
 9 stay that continued through the completion of related litigation exceeded the district court's  
 10 discretion). Indeed, at the moment, neither this case nor the Court of Claims case is moving  
 11 towards trial.

12 Though defendants claim their position is motivated by judicial economy and avoiding  
 13 duplicative litigation, the real goal is more delay. If defendants were actually concerned about  
 14 judicial economy and "duplicative" litigation, they would have jumped on Avocent's proposal to  
 15 transfer the present action to New York where Avocent's claims against Raritan are pending.  
 16 The defendants' failure to even address Avocent's proposal speaks volumes about defendants'  
 17 actual motives. Avocent filed its infringement claims against Raritan in August 2010, nearly  
 18 four years *after* Avocent initiated this action. The defendants' suggestion that this Court stay this  
 19 case until the conclusion of that litigation, filed years later, is simply absurd.<sup>2</sup>

### 20 **C. This Is Not A Translogic Case**

21 Undeterred by the fact that Avocent has twice prevailed as to all of the OSD-based claims  
 22 during the Patent Office reexamination proceedings, defendants urge this Court to continue the  
 23 stay while the reexamination of nine claims of the '978 patent continue. If those nine claims  
 24 remain rejected at the time of trial, Avocent will voluntarily withdraw its infringement claims to  
 25 avoid the potential *Translogic* issue the defendants identify as a basis to continue the stay.

26 \_\_\_\_\_  
 27 <sup>2</sup> Depositions in the *Raritan* case started just this week and will continue for the next four months. Lifting the stay  
 now will permit the parties to consolidate discovery of former employees and other third parties so as to minimize  
 burden. Multiple depositions of the same witnesses, especially non-parties, are burdensome, unfair and inefficient.

1 Avocent is confident that it will ultimately prevail on the patentability of these nine claims, but  
 2 those claims are not essential to Avocent's infringement allegations against these defendants.  
 3 Defendants appear to be of the same view as to Avocent's chances on appeal. Tellingly,  
 4 defendants do not even address the Examiner's contention that Avocent's "pod-switch-pod"  
 5 claims, which Avocent has asserted against KVM switch systems that utilize both a workstation  
 6 pod and a computer interface pod, do not require separate "pods."

7 As to the numerous other claims Avocent asserts in this action, the Patent Office has  
 8 twice reconfirmed the patentability of those claims, and Avocent's contentions as to at least  
 9 those claims will require trial. Defendants argue that Avocent's assumption is not true, and that  
 10 despite the Patent Office's repeated confirmation of these claims, they may be invalidated by  
 11 decisions in the Court of Claims or *Raritan* actions. (Opp. at 8). But that is not a *Translogic*  
 12 issue. Rather, it is a request that this Court defer action in this case in deference to the courts  
 13 handling the two later-filed actions. That was the position considered and squarely rejected by  
 14 the Supreme Court in *Landis*. (See Section A, above). Defendants' argument, however, is  
 15 noteworthy for another reason. Although defendants all urged this Court to stay the proceeding  
 16 in order to obtain the Patent Office's "expert" opinion of the patentability of Avocent's patent  
 17 claims in light of an alleged recent "sea change" in the law, once the defendants obtained that  
 18 opinion, twice in fact, they trivialized it – and assure the Court that they, or Raritan, will prove it  
 19 wrong at trial. What then was the purpose of staying the case in deference to the Patent Office  
 20 reexamination process? Defendants' objective then was the same as it is now: Delay, forty-two  
 21 months and counting. Most patent cases are tried in half that time.

#### 22 **D. Avocent's Motion Is Not An Untimely Motion For Reconsideration**

23 Finally, defendants again attempt to erect a procedural barrier to substantive  
 24 consideration of Avocent's motion, arguing that Avocent's motion is an untimely motion for  
 25 reconsideration. But defendants do not identify what decision Avocent is untimely asking the  
 26 Court to reconsider. The Court's October 30, 2007 Order stayed the action pending conclusion of  
 27 the Patent Office reexamination proceedings and the Court's October 27, 2009 Order continued

1 that stay, adding the requirement that the parties to the Court of Claims action submit decisions  
2 on substantive motions and the claim construction process to it. The parties all agree that the  
3 first round of reexaminations ended no later than November 3, 2009, when the Patent Office  
4 issued the first Reexamination Certificate for the '096 patent. Nor can there be any dispute that  
5 Avocent and Rose fully complied with the requirement to submit to this Court decisions rendered  
6 by the Court of Claims.

7 Thus, it is not fair to describe Avocent's motion as a request for reconsideration – the  
8 conditions this Court imposed have been met. Although defendants requested it, this Court did  
9 not condition lifting the stay on completion of the Court of Claims action. Even if it had, the  
10 current status of that case warrants consideration as a changed circumstance, and defendants'  
11 decision to argue in favor of continuing the stay in the Joint Status Report filed on April 26, 2011  
12 makes clear that the continuation of the stay is very much a live issue before the Court. Indeed,  
13 the Patent Office issued the second Reexamination Certificate for the '096 patent on March 8,  
14 2011, just two months ago. (Dkt. 238-1, pp. 42-46 (Certificate)).

15 Moreover, and as explained in Avocent's Opening Memorandum, competition between at  
16 least Avocent and Aten has recently intensified. Rather than disputing the correctness of  
17 Avocent's factual assertions regarding this heightened competition, the defendants wrongly  
18 suggest that Avocent should have brought this issue to the Court's attention earlier. (Opp. at 3).  
19 But the events in question began in 2009 with the *submission of bids*; the result of that  
20 competitive bidding did not unfold for some time. Indeed, Mr. Jehring advised that although he  
21 understands that his former customer APC awarded the contract to Aten, he will be unable to  
22 confirm that fact until APC unveils its new product line. (Jehring Declaration, point 9). Thus,  
23 contrary to defendants' suggestion, these events are only now unfolding. Whatever the previous  
24 level of competition, Aten is *right now* in the process of using Avocent's patented technology to  
25 take a multi-million dollar annual account from Avocent. This level of competition qualifies as a  
26 changed circumstance and weighs heavily in favor of lifting the stay. *F5 Networks, Inc. v. A10*  
27 *Networks, Inc.*, 2010 U.S. Dist. LEXIS 136238 (W.D. Wash. Dec. 10, 2010).

1 DATED this 13<sup>th</sup> day of May, 2011.

2 s/John A. Knox #12707  
3 WILLIAMS, KASTNER & GIBBS PLLC  
4 601 Union Street, Suite 4100  
5 Seattle, WA 98101-2380  
6 Tel: (206) 628-6600  
7 Fax: (206) 628-6611  
8 Email: [jknox@williamskastner.com](mailto:jknox@williamskastner.com)

9 James D. Berquist  
10 J. Scott Davidson  
11 Donald L. Jackson  
12 DAVIDSON BERQUIST JACKSON & GOWDEY, LLP  
13 4300 Wilson Blvd., Suite 700  
14 Arlington, Virginia 22203  
15 Tel: (703) 894-6400  
16 Fax: (703) 894-6430  
17 Email: [jberquist@davidsonberquist.com](mailto:jberquist@davidsonberquist.com)  
18 [sdavidson@davidsonberquist.com](mailto:sdavidson@davidsonberquist.com)  
19 [djackson@davidsonberquist.com](mailto:djackson@davidsonberquist.com)

20 Attorneys for Plaintiff Avocent Redmond Corp.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on May 13, 2011 the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

*Attorneys for Rose Electronics, Peter Macourek, and Darioush "David" Rahvar:*

Jeremy E Roller  
Yarmuth Wilsdon Calfo PLLC  
818 Stewart St., Ste. 1400  
Seattle, WA 98101

Michael S. Dowler  
Park Vaughn Fleming & Dowler  
5847 San Felipe Ste 1700  
Houston, TX 77057

Floyd R. Nation  
Jeffrey J. Phillips  
WINSTON & STRAWN LLP  
1111 Louisiana, 25<sup>th</sup> Floor  
Houston, TX 77002

Brian L. Jackson  
LAW OFFICE OF BRIAN L. JACKSON  
1302 Waugh Drive, #582  
Houston, TX 77019-3908

*Attorneys for Aten Technology, Inc. and Aten International Co., Ltd.:*

Thomas F. Ahearne  
Jeremy R. Larson  
FOSTER PEPPER PLLC  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101-3299

Ming-Tao Yang  
FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, LLP  
Stanford Research Park  
3300 Hillview Avenue  
Palo Alto, CA 94304-1203

*Attorneys for Belkin International, Inc. and Belkin, Inc.:*

Michael A. Moore  
CORR CRONIN MICHELSON BAUMGARDNER  
& PREECE LLP  
1001 4th Ave Ste 3900  
Seattle, WA 98154-1051

David P. Enzminger  
Ryan K. Yagura  
Vision L. Winter  
O'MELVENY & MYERS LLP  
400 South Hope Street  
Los Angeles, CA 90071-2899

DATED this 13th day of May, 2011.

s/John A. Knox